NO. 46229-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN A. PETERS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge
The Honorable Amber L. Finlay, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel's failure to move to sever Peters's Robbery in the Second Degree charge from his Escape from Community Custody charge denied Peters effective assistance of counsel.

2. The trial court erred in entering a verdict against Peters for Robbery in the Second Degree.

3. The trial court erred in entering a verdict against Peters for Escape from Community Custody.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether Peters was denied effective assistance of counsel when defense counsel failed to move to sever unrelated robbery and escape from community custody charges for trial and the failure to sever likely caused Peters to be convicted of both charges?

C. STATEMENT OF THE CASE

1. Procedural history

The State's original Information charged Peters with a single count of Robbery in the Second Degree[1] occurring on January 11, 2014. Appointed counsel James Foley initially represented Peters. On February 18, 2014, the court entered a Consolidated Omnibus Order. RP1 3; Supplemental Designation of Clerks' Papers, Consolidated Omnibus

[1] RCW 9A.56.201(1)

Order (sub. nom. 17). At page 4 of the Order, there is an unspecified reference to "1) Theft 1, Theft 2, 2) Escape from Com Custody, 3) Burg 1 Burg 2."

Attorney Foley and Peters found themselves at odds. The court allowed Foley to withdraw as counsel citing conflict of interest. The court appointed attorney Peter Jones to represent Peters. Jones represented Peters through the remainder of the case.

On April 7, 2014, the court held a pre-trial management hearing where it reviewed the Consolidated Omnibus Order. Supp. DCP, Consolidated Omnibus Order (sub. no. 17). The court noted "holdback charges - theft 1, theft 2, escape from community custody, burglary 1, burglary 2." RP1 36. The court asked about the length of the case. The prosecutor started to talk about the escape from community custody. RP2 36. Defense counsel Jones interrupted and said, "I think the escape from community custody would have to be charged as a separate case." RP1 36. The court replied that the Consolidated Omnibus Order put the parties on notice of what charges the State wanted to file. RP1 36; Supp. DCP, Consolidated Omnibus Order (sub. nom. 17). The court then said, "If you are looking at wanting to make a motion, you need to do so expeditiously." RP1 36. Defense counsel Jones acknowledged the court's remark by saying, "Yes, Your Honor." RP1 36.

On April 22, the court called the case ready for trial. RP1 38. The State filed a First Amended Information. It added Count Two, Escape from Community Custody.[2] The alleged incident date was January 10, 2014, a day before the alleged date of the robbery charge. RP1 40; CP 22-23. Peters did not object to the filing and entered a not guilty plea. RP1 40. The court heard the case on April 23 and 24. RP1; RP2. Defense counsel did not make a motion to sever the robbery charge from the escape from community custody charge.

The jury found Peters guilty of both charges. CP49, 52; RP 200.

At sentencing, Peters agreed to his offender score calculation. RP2 205-06, 209. The court sentenced him to 73.5 months in prison. CP 7; RP 2125. Peters filed a timely Notice of Appeal. CP 3.

2. Trial testimony

(i) January 11, 2014, robbery

On January 11, 2014, 70 year-old Ida Malcom was at the Little Creek Casino[3] playing a machine. RP2 78-79. A man sat down on the stool next to her. RP2 78. The man was not playing a machine. Instead, she thought he was talking on a cell phone. RP2 79. The man stood up and leaned "into her" with all his weight. RP2 79. She tried shoving him back but could not budge him. RP2 79. The leaning pushed her "a little

[2] RCW 72.09.310

[3] Little Creek Casino is an Indian casino located on tribal land.

bit" but she did not go "very far." RP2 81. Although the man was not really aggressive, Malcom thought the encounter "wasn't fun." RP2 82. The leaning lasted for about 20 seconds during which time the man cashed out her machine, grabbed her ticket and her purse, and ran away with both. RP2 80, 85. The man did not have permission to take either the ticket or the purse. RP2 85.

Malcom told another man playing near her, "He just stole my ticket." That man ran after the thief. RP2 80.

Malcom described the man as having a dark complexion and wearing a "cute little squashy hat" and a leather jacket. RP2 81.

Squaxin Island Tribal Police Officer Tracy Rollins responded to the casino. RP2 105-06. She reviewed surveillance video provided to her by casino surveillance supervisor Darrell Longshore. RP2 60-62, 106. The video showed a man wearing a yellow shirt and a jacket running out of the casino. The man ran through the parking lot and towards the woods behind the casino's event center. RP2 65-67. After reviewing the surveillance tapes, Officer Rollins went behind the casino looking to see if she could recover the purse as she suspected it might have been dumped. RP2 108. She arrived behind the casino about 15 minutes after the purse was stolen. RP2 113. What she found behind the casino was Mr. Peters wearing a tight t-shirt and holding a yellow shirt, a jacket, and a ball cap.

RP 109-10, 116. It was a chilly evening. RP 117. Mr. Peters ran when Officer Rollins told him to put his hands in the air. After a short chase, a casino security guard grabbed Mr. Peters. Officer Rollins took Mr. Peters into custody and placed him in her patrol car. RP 111-12.

Mason County Sheriff's Deputy Bradley Trout arrived and transferred Mr. Trout into his patrol car.[4] He advised Peters of his *Miranda* rights.[5] Peters waived his rights and agreed to speak to Deputy Trout.[6] RP 121. Trout wanted to recover and return Malcom's purse. RP 121. He asked Peters if he had a grandma and did he know that grandmas carried things like their grandkids' photos in their purse and getting the purse back to a grandma was a good thing. RP2 121-22. Peters responded by asking Deputy Trout "If I tell you where it is will you drop all my charges?" RP2 123.

Deputy Trout reviewed the surveillance video. He believed the clothing Peters was holding when contacted by Rollins was the clothing worn by the person sitting next to Malcom at the machines. RP2 125-27.

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[4] Mason County contracts with the Squaxin Tribe to prosecute felonies committed on tribal land. RP2 120.

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 696 (1966)

[6] The court heard a pre-trial CrR 3.5 hearing and found Peters's statements admissible in the State's case-in-chief. RP1 11-27.

No one who had actually seen or been present when the purse was taken was taken by the police to look at Peters and see if they could identify him as the thief.

Malcom's purse was not recovered. The casino did pay her for the stolen ticket. RP2 80.

Peters did not testify and presented no witnesses. RP2 137.

The court instructed the jury that to find Peters guilty of Robbery in the Second Degree it had to find with the intent to commit theft, he took property from the person of, or in the presence of, a person against the person's will by use or threatened use of immediate force, violence, or fear of injury to that person or her property. Supp. DCP, Court Instructions to the Jury, sub. nom. 47 (Instruction 7).

Peters proposed, and the court instructed the jury on the lesser included offenses of Theft in the First Degree and Theft in the Third Degree. Theft in the First Degree required the jury to find Peters wrongly obtained or exerted unauthorized control of property taken from the person of another. Supp. DCP, Court's Instructions to the Jury, sub. nom. 47 (Instruction 13); RCW 9A.56.030(1)(b). Theft in the Third Degree required the jury to find Peters wrongly obtained or exerted unauthorized control of another's property. Supp. DCP, Court's Instructions to the Jury, sub. nom. 47 (Instruction 15); RCW 9A.56.050.

In its instructions, the court also told the jury it must consider each count separately and that their verdict on one count should not control their verdict on another count. Supp. DCP, Court's Instructions to the Jury, sub. nom. 47 (Instruction 6).

Peters's defended the robbery charge by arguing he was never identified as the person who stole the purse. He questioned why, if he had taken the purse and was last seen running for the woods, he would be hanging around the back of the casino approximately 15 minutes later. RP2 182-91. In short, he argued the police got the wrong guy. RP2 182-91. Peters did not deny though that he was the person behind the casino that Officer Rollins contacted.

(ii) January 10, 2014, failure to contact community custody officer

Donovan Russell is a Department of Corrections (DOC) community corrections officer. RP2 89. He supervises people, mostly felons, who are released from prison with community custody conditions. RP2 89-90. He supervised Peters on his felony conviction. RP2 91. Peters has been on his caseload since September 2013. RP2 90, 102. In supervising Peters, his job was to help reintegrate Peters into the community and to make sure Peters followed conditions of sentencing

imposed by a Mason County Superior Court judge for his felony conviction. RP2 90-91.

On January 6, 2014, Peters came to the Shelton DOC office to meet with Russell. Russell was not in so the duty officer, Community Corrections Officer William Corbett, met with Peters and told him to report to Russell the next morning at 9:00 a.m. RP2 99. Peters did not report the next morning. RP2 99. Russell was not in his office the next morning. Instead, Russell was in his office on January 8, 9, and 10. Peters did not report to him on any of those days. RP2 101. Russell had last talked to Peters – by phone – on January 2. RP2 92. It is important for supervised felons in the community, like Peters, to contact Russell because it makes it easier for him to manage his 41-person caseload. RP2 103. But in managing his caseload, Russell himself had not set dates and times for Peters to report to him. RP2 103. He did not order Peters to report to him the week of January 6. RP2 102. Peters was current in filing his monthly reports to include giving Russell his current address. Peters filed his last monthly report on January 6, 2014. RP2 102.

By January 10, DOC had issued a felony escape warrant for Peters. RP2 91. The court instructed the jury that to find Peters guilty of Escape from Community Custody, it had to find Peters, while on supervision for a felony conviction, willfully discontinued making himself available to

DOC for supervision by making his whereabouts unknown or by failing to make contact with DOC as directed by his community corrections officer. Supp. DCP, Court's Instructions to the Jury, sub. nom. 47 (Instruction 18).

Peters's defended the escape charge by arguing there was a lack of proof that he willfully made himself unavailable for supervision. RP2 182-91.

D. ARGUMENT

PETERS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO MOVE TO SEVER THE ROBBERY CHARGE FROM THE ESCAPE CHARGE.

Defense counsel's failure to move to sever the robbery charge from the escape charge fell below the objective standard expected of a reasonable attorney. The failure caused Peters prejudice. There was a reasonable likelihood Peters would have been acquitted of either or both charges absent the jury being able to consider the irrelevant and prejudicial evidence germane to only the improperly joined other charge. Peters's convictions should be reversed and remanded for severance and retrial.

Article I, Section 22 and the Sixth Amendment guarantee criminal defendants receive effective representation of counsel. U.S. Const Amend. 6; Const. Art. I §§ 3, 22; *Strickland v. Washington*, 466 U.S. 668, 104

S.Ct 2052, 80 L.Ed2d 674 (1984); *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). A defendant establishes ineffective assistance by showing (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Decisions based on reasonable tactics or strategy are not deficient. *State v. Pottorff*, 138 Wn. App. 342, 349, 156 P.3d 955 (2007). Prejudice exists when, but for the deficient performance, there is a reasonable probability the result would have been different. *State v. B.J.S.*, 140 Wn. App. 91, 100, 169 P.3d 34 (2007). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008). Ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

A trial court must sever offenses when "severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).[7] This is true even if offenses are properly joined on one charged document. *Id*; CrR 4.3(a)(1);[8] *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). Joinder of unrelated offenses is inherently prejudicial. *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). A defendant may be prejudiced by joinder in a number of ways:

> (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.

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[7]CrR 4.4(b) provides
Severance of Offenses. The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

[8]CrR 4.3(a) provides:
(a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
(1) Are of the same or similar character, even if not part of a single scheme or plan; or
(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) (citations omitted). Factors that may mitigate this inherent prejudice include:

> (1) The strength of the State's evidence on each count, (2) clarity of defenses on each count, (3) the court properly instructs the jury to consider the evidence of the crimes, and (4) the admissibility of the evidence of other crimes even if they had been tried separately or never charged or joined.

Harris, 36 Wn. App. at 750 (*citing State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934 (1972)). Trial counsel's failure to make a motion to sever offenses will support an ineffective assistance of counsel claim only when the defendant can show the severance motion, properly made, would have been granted. *State v. Jamison*, 105 Wn. App. 572, 591, 20 P.3d 1010, *review denied*, 144 Wn.2d 1018 (2001); *State v. Price*, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005) *aff'd*, 158 Wn.2d 630 (2006). Denial of a motion to sever offenses when such severance should have been granted is an abuse of discretion. *Harris*, 36 Wn. App. at 749-50.

There was no legal basis to join the escape with the robbery. On the flip side, there was no legal basis to join the robbery with the escape. The evidence from one charge had no overlap with the evidence from the other charge. Nothing about the facts of the escape was cross-admissible with the robbery. And the reverse was true. Nothing about the robbery was cross-admissible with the escape. The trial court instructing the jury

they were to consider the evidence of each charge separately did not remedy the irreparable harm infused into jury deliberations. The court never told the jury that in considering each charge, it could not use irrelevant and highly prejudicial evidence of the other charge to find Peters guilty.

DOC community corrections officers Russell and Corbett had no relevant testimony to add to the robbery charge. Their testimony was only prejudicial. Without them, a jury hearing only the robbery charge would never have heard that Peters, a felon, was released from prison and into their community just a few months earlier in September 2013. Without the DOC officers testimony, the jury would never have heard a Mason County Superior court judge obligated Peters to be on "community custody" after his release from prison. This court-imposed obligation would tell an average juror that Peters, after his recent release from prison, must have committed a bad enough crime that he needed to be supervised in the community by trained corrections officers after his release from prison. In other words, their testimony told the jurors that Peters could not be trusted in the community if left to his own devices. After all, oversight was a primary purpose of community custody per Officer Russell. His job was to keep track of Peters and make sure he abided by judge-imposed conditions. RP2 90. The community was safer if DOC knew the

whereabouts of Peters. None of this testimony, or the reasonable inferences from the testimony, was relevant to the determination that Peters robbed Malcom.

To prove the escape from community custody, the jury did not need to be told Peters had grabbed a 70 year-old woman's purse and ran off with it at a local casino. That information was totally irrelevant on the issue of whether Peters was reporting as he should to his community corrections officer.

The evidence of the robbery was not so strong that it was unaffected by the escape testimony. Malcom testified the man from the adjacent stool leaned into her for about 20 seconds while he grabbed her purse and her ticket. His leaning did not push her far. He was not aggressive in his leaning. Proof of robbery requires that the taking was "against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person." Supp. DCP. Court's Instructions to the Jury (Instruction 10). "Force" was not defined for the jury. Jury Instruction 7 did provide some additional information about the term.

> A threat to use immediate force or violence may be either expressed or implied. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial.

Supp. DCP, Court's Instructions to the Jury. The court felt there was enough question about the use of force to instruct the jury on Theft in the First Degree, taking property from a person without force, and Theft in the Third Degree, the mere taking of property without force. Supp. DCP, Court's Instructions to the Jury (Instructions 13, 15).

Also, the evidence was not determinative in that it was actually Peters who took the purse. No one who actually saw the purse thief in person in the casino was taken by the police to look at Peters to see if they could identify him as the purse thief.

In closing argument, Peters denied being the purse thief. Peters argued it made no sense for him to be behind the casino and available for contact by Officer Rollins if, a substantial amount of time ealier, the surveillance video showed the purse thief running out of the casino and to the woods in the other direction.

Knowing that Peters was a recently released felon, for whom a judge determined needed to be supervised while in the community, could have been the tipping point in the jury's determination that it was actually Peters who used "force" to grab Malcom's purse. Without the irrelevant and prejudicial information about Peters's history as a criminal, who could not be trusted in the community without supervision, the jury may not

have thought – or been split in its thought process – on (a) whether the leaning amounted to sufficient force to find Peters guilty of Robbery in the Second Degree or (b) that Peters was even the purse thief.

The evidence of Escape from Community Custody was similarly not strong and the jury could have easily been influenced by the evidence of Peters's purported purse and ticket grab from a woman in her seventies. Community Corrections Officer Russell preferred having his clients periodically report to him on their own time. He did not order Peters to report on January 7. He did not testify that Peters's reporting was otherwise inadequate. Peters did report to DOC of his own devices on January 6. Because assigned Officer Russell was not in that day, Officer Corbett told Peters to come back the next day, January 7, to see Russell. Russell was not in the office on January 7. In order for the jury to find Peter's guilty of Escape from Community Custody, the jury had to find Peters's conduct was willful.

> (1) That on or about 10th day of January, 2024, the defendant was subject to community custody pursuant to a conviction of a felony;
>
> (2) That the defendant willfully discontinued making himself available to the Department of Corrections for supervision by making his whereabouts unknown or by failing to maintain contact with the Department of Corrections as directed by his community correction officer;
>
> (3) That the acts occurred in Mason County, State of Washington.

Supp. DCP, Court's Instructions to the Jury (Instruction 18).

Perhaps a jury may not have found Peters's failure to report on the 7th willful had they also not known the otherwise inadmissible and irrelevant information that on January 11, Peters was theoretically at the local casino stealing a purse. The jury could only have been prejudiced by that testimony.

The jury must also have been confused as to why a judge would allow two seemingly unrelated charges to be heard at the same time, especially as Peters denied any involvement in the robbery. One has to wonder if the jury felt something akin to "Of course Peters was the purse thief. Why else would the judge allow the cases to be heard at the same time?"

To argue that judicial economy was served by trying the cases together is tantamount to saying it is okay to try unrelated charges even if Defendant A was charged with Count One only and Defendant B was charged with only Count Two and the two counts were unrelated to each other in any way and, in fact, occurred on separate days. It would always be less expensive to empanel one jury to hear multiple charges even if it was, as here, a mix and match of unrelated charges and defendants.

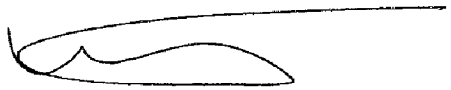
Where a defendant demonstrates that the manifest prejudice of joinder outweighs concerns for judicial economy, severance should be

granted. *State v. MacDonald*, 122 Wn. App. 804, 814-15, 95 P.3d 1248 (2004) (citing *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990)). Had Peters's counsel moved to sever the charges, it likely would have been granted. Counsel was ineffective for failing to make the motion.

E. CONCLUSION

Mr. Peters's robbery and escape convictions should be reversed and his case remanded for retrial

Respectfully submitted this 26th day of January 2015.



LISA E. TABBUT/WSBA 21344
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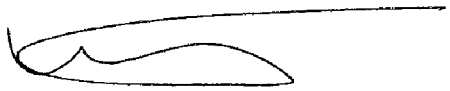
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Opening Brief to: (1) Timothy Higgs, Mason County Prosecutor's Office, at timh@co.mason.wa.us, (2) the Court of Appeals, Division II; and (3) I mailed it to Benjamin A. Peters/DOC#855811, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 26, 2015, in Mazama, Washington.



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